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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER THE APPLICATION OF ARIZONA PUBLIC SERVICE COMPANY FOR APPROVAL OF LOST FIXED COST RECOVERY MECHANISM	)))))	**DOCKET NO. E-01345A-11-0224** **EFCA'S REPLY IN SUPPORT OF ITS APPLICATION FOR LEAVE TO INTERVENE AND MOTION FOR PROCEDURAL CONFERENCE**

The Energy Freedom Coalition of America ("EFCA"), by and through its undersigned counsel, hereby submits this Reply in Support of its Application for Leave to Intervene and Motion for Procedural Conference in the above-captioned proceeding (the "Proceeding"). On January 15, 2016, APS filed a new application, requesting that the Arizona Corporation Commission (the "Commission") permit APS to collect an additional $46.4 million over the next twelve (12) months through its Lost Fixed Cost Recovery ("LFCR") mechanism (the "Application"). For the reasons set forth below, it is appropriate to grant EFCA's Application and Motion.

I. EFCA has a direct and substantial interest in this matter

The Arizona Public Service Corporation ("APS") argues that EFCA, a solar industry advocacy organization, cannot advocate on behalf of the interests of its members or of its members' customers. If the Commission were to adopt this logic, it would do so by reversing its long, established history of permitting advocacy groups such as EFCA (EFCA also being a group that has been permitted to intervene in similar proceedings) to intervene as an efficient means of

protecting the interests of the advocacy group's stakeholders. EFCA represents the interest of its members, which encompasses the interests of its members' customers in ensuring that its customers and the solar energy systems they invest in (or are considering purchasing or leasing) are treated fairly. APS's argument seeks to redefine who can intervene in cases and, if accepted, would mean that only ratepayers themselves would be permitted to intervene in Commission actions. Such a holding would be inefficient and a waste of judicial resources and overturn decades of precedent.

A quick review of the list of Intervenors in the original application filed in this docket demonstrates numerous entities, just like EFCA, were deemed to have standing to intervene just like they have been permitted regularly in countless dockets before the Commission. The Sierra Club, Arizonan's for Electric Choice and Competition, Western Resource Advocates, the Arizona Investment Council, the Arizona School Boards Association, the Arizona Association of School Business Officials, and countless other similarly situated organizations were permitted to intervene in this docket and routinely intervene in others at the Commission.

Further, EFCA has met the threshold set forth and demonstrated that its interests are both direct and substantial. The interest here directly impacts EFCA's members. The adjustment to rates will be paid by ratepayers that invested in distributed generation solar devices ("DG Systems") along with nearly one million other ratepayers. Because EFCA's members develop, sell and install these DG Systems (and in many instances, maintain ownership of the DG Systems via a lease agreement), *any* change in rates directly and substantially impacts both EFCA's members and its members' customers.

EFCA's members and members' customers' interest in *any* rate adjustment pursuant to the LFCR is substantial. Certainly, APS is not proposing a new standard that requires a rate increase to reach a certain threshold amount before one can claim it is substantial and therefore intervene to protect their interests? The implications of such a policy would be that the utility could routinely file for small rate increases that it deems to not be "substantial" and prohibit anyone from intervening. APS is proposing a substantial increase in its revenue between rate cases. EFCA's

members and its member's customers are substantially impacted by this Application and should be permitted to intervene.

II. EFCA's Intervention does not Broaden the Proceedings.

EFCA wishes to intervene simply to ensure that the LFCR is being applied in a fair, accurate, and legal manner. Because the rates increase sought by APS in this Application directly and substantially impacts DG System users, EFCA should be permitted to intervene and object to the adoption of such rates to the fullest extent permitted under the law. The settlement agreement that adopted the LFCR does not prohibit intervention when APS submits a new Application to adjust its rates as it does in this instance. The Commission, even when utilizing the LFCR, is obligated to ensure that the rates are just and reasonable. *See* Ariz. Const, art. 15,§ 3. EFCA can assist the Corporation Commission in ensuring that any rates adopted in this Proceeding are just and reasonable, for both APS, EFCA's members and the solar customers impacted by such rate adjustments.

Similarly (and as discussed in greater detail below), if the LFCR mechanism is not constitutional, than the Commission lacks the jurisdiction to effectuate the rate adjustment APS is asking for and the Application would therefore have to be denied. It is inaccurate to claim that EFCA is seeking to "expand a simple compliance filing into a full blown rate case." The fact is that pending litigation has cast doubt onto the Commission's ability to grant the Application. If the Corporation Commission determines that the caselaw nullifies its ability to adopt and utilize the LFCR mechanism, then the Commission must deny the Application.

Simply put, the purpose of EFCA's intervention in this Proceeding is to determine whether the rate increase being requested by APS is fair and constitutional. The constitutionality of the mechanism by which APS seeks to impose new rates on its one million residential customers is essential to determining whether the Commission will grant APS' application and adopt the rate increase requested therein. The constitutional question is simply limited to whether the Commission possesses the authority to grant this Application. EFCA does not seek to address any issues beyond the rate adjustment at bar in APS' application and is therefore, not seeking to impermissibly broaden the proceedings. Despite APS's protestations, it cannot be the case that

questioning the legality of an application equates to broadening the scope of a proceeding. If it were, no party would ever be permitted to protest.

III. No Prejudice arises from EFCA's Intervention.

APS incorrectly argues that both it and the other signatories to the settlement agreement wherein the LFCR was adopted would be prejudiced by EFCA's intervention.

Initially, if this were true, the settlement agreement would have either prohibited intervention or adopted more stringent standards for intervention. The settlement did not do so, ostensibly because all parties realized that intervention may be necessary to ensure that the Commission is adopting just and reasonable rates in future applications, which it must do on a case by case basis. *See, e.g. Scates v. Ariz. Corp. Com'n*, 118 Ariz. 531, 534, 578 P.2d 612, 615 (App. 1978). Although the LFCR mechanism was adopted to permit a streamlined rate adjustment process, it did not contemplate abdicating the constitutional requirement that the Commission ensure reasonable rates on a case-by-case basis. Such a process would include adopting the safeguards such as permitting intervention by parties that are directly and substantially affected as is EFCA.

In fact, a failure to permit intervention would only prejudice ratepayers and EFCA's members to hold that the settlement agreement forever forecloses any intervention even in new applications like the one at hand. EFCA's members and members' customers are directly and substantially impacted by the rate increases adopted via the LFCR mechanism. Arizona courts have stated:

> The [Corporation] Commission was not designed to protect public service corporations and their management but, rather, *was established to protect our citizens* from the results of speculation, mismanagement, and abuse of power. To accomplish those objectives, *the Commission must have the power to obtain information about, and take action to prevent, unwise management or even mismanagement and to forestall its consequences* in intercompany transactions significantly affecting a public service corporation's structure or capitalization.

Arizona Corp. Com'n v. State ex rel. Woods, 171 Ariz. 286, 296, 830 P.2d 807, 817 (1992) (emphases added). EFCA seeks to represent its members and its members' customers' interests

via intervention. Those are the very same individuals that will be directly impacted by the proposed rates. The true prejudice, therefore, would be to lock out these customers from the Proceeding.

Further, no signatory to the settlement agreement is harmed if the LFCR is stricken. Certainly, the unconstitutionality of the LFCR would have a direct impact on APS, however, no other rates would be adjusted and no ratepayers or other interests would be negatively impacted if APS stopped collecting the LFCR. The fact that APS alleges it would be prejudiced if the LFCR were ruled unconstitutional has to be outweighed by the prejudice to all ratepayers if they remain bound to pay an unconstitutional charge.

Finally, APS hints that EFCA was simply dilatory in attempting to intervene as the settlement agreement was entered into years prior. This argument has no basis in fact. EFCA was not in existence at the time the settlement agreement was negotiated and executed. Thus, there was no failure to participate or dilatory motive in EFCA's application to intervene here. Additionally, the Application filed by APS opened the instant Proceeding and EFCA filed a timely application to intervene soon thereafter.

IV. EFCA may Assist the Commission

EFCA has already established the direct and substantial effect of the rate adjustments imposed via the LFCR mechanism that merits a grant of EFCA's application to intervene in the matter. To briefly reiterate, the rate adjustment is designed to and will directly and substantially impact all ratepayers subject to the LFCR including rooftop solar customers. EFCA was formed with a mission to advocate on behalf of the rooftop solar industry. It represents substantial portion of the industry's providers and through them, the impacted ratepayers that have purchased or leased such a system. This places EFCA in a unique position to assess the impacts that any rate adjustment will have on both the industry and ratepayers impacted by it. Accordingly, EFCA's intervention in this Proceeding is valuable and warranted.

V. The Motion is Warranted in the Interests of Judicial Economy and for the Purpose of Determining the Issues at bar.

APS also objects to the Motion on the grounds that (1) the decision invalidating the system improvement benefits ("SIB") mechanism as unconstitutional, *Residential Utility Consumer Office*

v. Arizona Corporation Com'n, 238 Ariz. 8, 355 P.3d 610 (App. 2015), *cert. granted* February 9, 2016 ("*RUCO*") is currently being reviewed by the Supreme Court; and (2) the applicability of the *RUCO* case to the LFCR mechanism, even if upheld on review, is unclear.

Initially, we agree that action should not be taken on the Application until the Supreme Court issues its decision in the *RUCO* case. In EFCA's motion for procedural conference, EFCA specifically requests that the Commission issue a stay of this Application until the Arizona Supreme Court issues its decision. EFCA renews this request herein. Indeed, the forthcoming decision will primarily determine whether constitutionality of the LFCR is an issue at all. Because, however, the current caselaw has cast doubt concerning the constitutionality of ratemaking mechanisms such as the LFCR, it would be bad for APS and ratepayers alike for the Commission to continue permitting the utilization of the mechanism until a final decision of its constitutionality is made.

Second, "(A)n unconstitutional statute is in reality no law and is wholly void, and is as inoperative as if it had never been passed." *Moore v. Indus. Com'n*, 24 Ariz. App. 324, 328, 538 P.2d 411, 415 (1975) (internal citation omitted) (stating further that "as a result of this Court's holding in *De La Fuente*, the [Industrial] Commission was without jurisdiction to award petitioner death benefits under s 23—1046(A)(8)."). "In Arizona, unless otherwise specified, an opinion in a civil case operates retroactively as well as prospectively." *Fain Land & Cattle Co. v. Hassell*, 163 Ariz. 587, 596, 790 P.2d 242, 251 (1990). Thus, if the *RUCO* decision is upheld and applies to the LFCR, then the LFCR mechanism is null and void. Further, the Commission would lack the jurisdiction to have adopted it and the ability to continue utilizing it. *See, e.g., Findlay v. Bd. of Sup'rs of Mohave County*, 72 Ariz. 58, 62, 230 P.2d 526, 529 (1951) ("If the resolution in question is so unreasonable and so unjust as to be unconstitutional, then the board, in attempting to enforce it was without jurisdiction."). The settlement agreement cannot authorize the Commission to adopt and apply an unconstitutional ratemaking mechanism, no matter how well-intentioned the provision may have been.

Although EFCA believes that the *RUCO* holding applies to the instant Proceeding to invalidate the LFCR, EFCA concedes that there exists a debatable question as to whether the

RUCO decision would apply in this context and that such a determination is based in part on how similar the LFCR is to the SIB. But at a bare minimum, the *RUCO* decision casts substantial doubt on the constitutionality of the LFCR and unless or until it is overturned, the *RUCO* decision should be treated as the law in the State of Arizona. *See, e.g. RailNRanch Corp. v. State*, 1 Ariz. App. 558, 559, 441 P.2d 786, 787 (1968).

In addition, while APS characterizes the LFCR as merely permitting it to recover revenue it already was permitted to recover but cannot as a result of Commission policies set forth in the REST and EE Rules, it is notable that individual customers are choosing to implement rooftop solar without regard for the REST Rules at this time.[1] In this respect, this lost authorized revenue that APS claims merely to be replacing, is not being lost as a result of any Commission mandate or policy. As such, it appears that the LFCR is awarding APS increased revenues that do not make up for losses otherwise caused by Commission policies.

The proper means of addressing this uncertainty, however, is not to simply ignore or dismiss out of hand the constitutional question all together as APS suggests. Nor is it proper to make a decision on the constitutionality of the LFCR mechanism based on an application to intervene or motion for a procedural conference. Rather, the proper course of action is for the Commission to issue a stay of the Application until the Arizona Supreme Court issues a decision in its review of the *RUCO* case and, if the *RUCO* decision is upheld, to have a procedure in place to determine the applicability of *RUCO* and constitutionality of the LFCR mechanism in a meaningful and substantive way. As stated above, if the LFCR is unconstitutional, then the Application must be denied, but if the LFCR is found to be constitutional, only then may the LFCR Application be processed. For these reasons, the Commission should grant the motion for a procedural conference to adopt a procedure for answering this vital question raised by the Application. To act otherwise is to risk engaging in action with notice that such action may be unconstitutional.

VI. Intervention is the Proper Venue for Determining the Constitutionality of the LFCR Mechanism.

[1] Meaning that incentives are not driving the DG market and therefore it is customer choice, and not Commission policy, that is driving any lost revenue the LFCR makes up for.

APS finally argues that the complaint process as set forth in A.R.S. § 40-246 is the proper venue to challenge the constitutionality of the LFCR provision. This is simply untrue. Neither the settlement agreement creating the LFCR provision nor any other applicable rule of procedure prohibits EFCA's intervention once they have met the threshold for intervention.

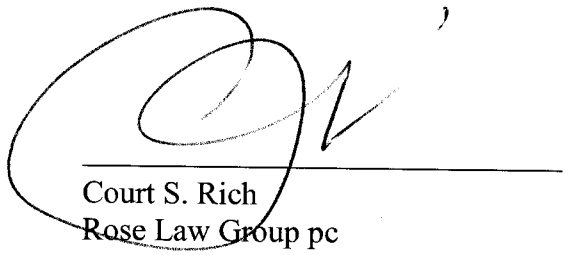
Second, subsection B of the statute already contemplates that "all matters" relating to the subject of the complaint may be "joined in one hearing." A.R.S. § 40-246(B). Thus, even if EFCA were to pursue a complaint, joinder of this Application would be appropriate. Because APS has already initiated the instant Application and the issue of the constitutionality of the ratemaking mechanism is in question, it would be a waste of judicial resources and economy to demand a wholly separate proceeding that would encompass the Application when the Application itself provides a sufficient venue to make a determination of the constitution of the LFCR mechanism.

Finally, "[c]onstitutional arguments [] may be raised at any time, although it is within the court's discretion whether to consider them." *Olson v. Walker*, 162 Ariz. 174, 181, 781 P.2d 1015, 1022 (App. 1989). This Proceeding is the first opportunity EFCA has had to raise questions of constitutionality in relation to the LFCR mechanism and in light of the holding in the *RUCO* case. Because determining the constitutionality of this ratemaking mechanism is of such great importance to whether the Application should be granted, the Commission should exercise its discretion to consider such arguments in a proper procedural manner. Therefore, EFCA's motion for a procedural hearing should be granted in order to either commence a hearing or stay the Application and to set forth the procedure for analyzing *RUCO* once the Arizona Supreme Court issues its decision on review

VII. Conclusion.

As set forth above and in its initial Application to Intervene and Motion for a Procedural Conference, EFCA should be permitted to intervene in this Proceeding. Additionally, the Commission should schedule a procedural conference for the purpose of setting a hearing on the Application or instituting a stay on processing the Application until the Supreme Court issues its decision in the *RUCO* case.

Respectfully submitted this 29th day of February, 2016.



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